SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-490

STATE OF TENNESSEE, EX REL, LUCIUS P. HUDSON, PAUL H. JORDAN, WALTER S. WILSON, JIM B. MARTIN, EDWARD J. L. PURSLEY, MRS. JAMES H. PRICHARD, L. D. RINGLEY, MRS. JAY M. ALTON, MAXCY T. PAGE, JAMES A. HUTTON, O. L. RODEN and KENNETH MARSH, -- *Petitioners*

v.

CITY OF CHATTANOOGA, a municipality within the State of Tennessee; and MAYOR ROBERT KIRK WALKER, ---------- *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

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NO. _____

STATE OF TENNESSEE, EX REL. LUCIUS P. HUDSON, PAUL H. JORDAN, WALTER S. WILSON, JIM B. MARTIN, EDWARD J. L. PURSLEY, MRS. JAMES H. PRICHARD, L. D. RINGLEY, MRS. JAY M. ALTON, MAXCY T. PAGE, JAMES A. HUTTON, O. L. RODEN and KENNETH MARSH,

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above styled case on July 29, 1974.

OPINION BELOW

The opinion of the Tennessee Supreme Court is printed in Appendix A hereto. The memorandum opinion of the trial court and the order entered pursuant thereto are printed as Appendix B and C respectively.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered on July 29, 1974. The jurisdiction of this Court is invoked under 28 United States Code Annotated 1257 (3) to review the final decision of the highest Court of the State of Tennessee.

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE STATUTES OF THE STATE OF TENNESSEE (TENNESSEE CODE ANNOTATED 6-309 AND 6-310) WHICH PROVIDE FOR ANNEXATION BY A MUNICIPALITY BY ORDINANCE AND THE METHOD TO CONTEST SUCH ANNEXATION ORDINANCE IS VIOLATIVE OF THE FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND EQUAL PROTECTION.

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 5th Amendment, U. S. Constitution: No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. 14th Amendment, U. S. Constitution–Citizenship: Due process of law–Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Tennessee Code Annotated 6-309 Annexation by ordinance.—A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed. Provided, however, that a smaller municipality may, by

ordinance, extend its corporate limits by annexation of any contiguous territory, when such territory within the corporate limits of a larger municipality is less than seventy-tive (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such, shall not be required of the smaller municipality for such annexation. [Acts 1955, ch. 113, §2; 1961, ch. 320, §1; 1969, ch. 136, §1.]

4. Tennessee Code Annotated 6-310. Quo warranto to contest annexation ordinance.—Any aggrieved owner of property lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with §§6-308—6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits, shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Should the court find the ordinance to be unreasonable, an order shall be issued

vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance, an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attack in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden of proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants.

During the time that any annexation ordinance is being contested as provided herein, the annexing municipality and the county governing body (and/or any affected school, sanitary or utility district) may enter into an agreement to provide for new, expanded, and/or upgraded services and facilities (including, but not limited to, equipment,

land, and buildings), and capital expenditures (including sale of bonds to finance such services and facilities, which agreement shall include an equitable division of the cost and liabilities of such capital expenditures between the annexing municipality and the county governing body (and/or affected school, sanitary, or utility district) upon final determination of such contested annexation ordinance. [Acts 1955, ch. 113, §2; 1961, ch. 220, §1; 1970 (Adj. S.), ch. 516, §1.]

It is a basic legal principle that one cannot be deprived of his property by state action without due process of law. *WOJNICZ v. MICHIGAN DEPARTMENT OF CORRECTIONS*, (1971) 188 N.W.2d 251, 32 Michigan, app. 121.

Due process of law is secured against state action by this clause. *State v. Percy*, (1958) 248 N.C. 334, S.E.2d 404.

Judicial decree which violates vested rights is within the prohibition of the due process clause. *Lander v. Siegel*, (1930) 298 Pa. 487, 148 A. 699; *Nesbit v. Riesman*, (1930) 298 Pa. 475, 148 A. 695, *cert. denied* 50 S. Ct. 480, 281 U.S. 754, 74 L. Ed. 1164.

The Federal guarantee of due process extends to state action through judicial as well as legislative, the executive or the administrative branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, (1930) 50 S. Ct. 541, 281 U.S. 673, 74 L. Ed. 1107.

Citizens may not be deprived of property without due process of law. *Williams v. White Plains Housing Authority*, (1970) 309 N.Y.S.2d 454, 622 Misc. 2d 613. The word "property" as used in this amendment includes every interest anyone may have in any and everything that is subject to ownership by man, together with the right

freely to possess, enjoy or dispose of same, and the right of user cannot be wholly taken away or limited by the state except insofar as it may become necessary for individual rights to yield to the best interest of the people.

STATEMENT OF THE CASE

This case arose when a group of citizens contested one portion of the massive annexation program of the City of Chattanooga. The area involved h rein is generally known as the Hixson Community and was designated areas 68A, 68B and 68C in the annexation program of the City of Chattanooga. Suit was filed on behalf of the petitioners in the Hamilton County Chancery Court wherein the constitutional question regarding the aforesaid annexation statutes were raised. The Judge overruled the petitioners' allegations concerning the constitutionality. (Appendix B)

After the petitioners presented their case and rested, the City moved that the Court sustain the annexation ordinance whereupon the motion was orally granted and subsequently, a memorandum opinion and order was entered. (Appendix B and C)

The petitioners duly appealed their case to the Tennessee Supreme Court raising the constitutional question of due process of law, equal protection and subsidiary questions therein. The Tennessee Supreme Court affirmed the Chancellor rejecting the federal constitutional claims raised in this petition. (Appendix A)

ARGUMENT

"Due process" as embodied in the 14th Amendment means "fundamental fairness." The petitioners contend that the application of the Tennessee annexation statutes

lack fundamental fairness and, therefore, violate the constitutional "due process" mandate.

1. In this case under TCA 6-309, it is necessary that the City submit a plan of services to the Hamilton County Regional Planning Commission by resolution. The resolution adopted by the City of Chattanooga referred to and adopted in its entirety a document prepared by Hensley Schmidt, Inc. entitled "A Study of the City of Chattanooga Fringe Areas." The said resolution adopted in toto the Hensley Schmidt study and was submitted to the Planning Commission. The pertinent parts of the said Hensley Schmidt report appear on page 28 being titled "Plan of Services Under the Variable Tax Rate." "The report presents a comprehensive plan of services under the annexation act of 1971 by the State Legislature using the variable tax rate structure." Further, on page 2 is as follows: "This report has been prepared for the Mayor and Commissioners in a form so that it may be submitted as a plan of services of the Act of 1971." On page 33 of said report, it is stated "If Chapter 420 of the Public Acts of 1971, which allows the use of variable tax rate, shall ever be finally held unconstitutional, or for any other reason it becomes inapplicable, then the annexation shall be governed by and effectuated under the statutes in effect at the time Ordinance No. 5977 was passed, namely, The Public Acts of 1961. The City of Chattanooga, in this event, shall request its consultant to prepare the plan of services under the Act of 1961 as soon as practicable."

Petitioners admit that the City of Chattanooga did submit a plan of services to the Planning Commission but that said plan of services was only applicable under the provisions of the variable tax act of 1971. (Appendix D) The resolution submitting the plan of services specifically stated that if the annexation was required under the 1955

acts as amended, the respondents shall request their consultant to prepare a plan of services under the 1955 act as amended in 1961. Undoubtedly the purpose and intent of the legislature of requiring a municipality to submit a plan of services to the Planning Commission, if there be one, was that the City Commission should have the benefit of professional planner's advice and recommendations. So clearly, we have a situation in the case at bar wherein the respondents have submitted a plan of services based totally on the variable tax act of 1971 (Appendix D) which was later declared to be unconstitutional by the Supreme Court of Tennessee. *Frost v. City of Chattanooga*, 448 S. W. 2d 370. The Planning Commission obviously considered the plan of service in light of the 1971 variable tax act. Annexation statutes should be strictly construed and followed. Accordingly, we feel that the fairness doctrine of the due process law prohibits the City from proceeding as they did in this case.

2. The method of contesting the annexation ordinance as provided by T.C.A. 6-310 places the burden upon the parties affected to prove that the ordinance is unreasonable. This is basically unfair and places an undue burden and hardship on the property owners who do not have the advantage of a well staffed organization and tax resources. This unfair burden has been recognized by the Tennessee Legislature and on March 28, 1974, passed an amendment to T.C.A. 6-310 which reads as follows:

> "The municipality shall have the burden of proof that annexation ordinance is reasonable for the overall well-being of the communities involved."

However, this recently enacted statute did not apply to the case at bar since it was heard in September, 1973, under the provisions of T.C.A. 6-310, as herebefore set forth.

3. The Tennessee annexation statutes are unfair and violative of due process in that there is no provision which binds or requires the municipality to follow or continue the plan of service after the effective date of the annexation. Once the annexation is approved by the Court, there is no way that the people in the affected area can be assured that the City will carry out the proposed plan of services, and there is no legal remedy if the City does not.

4. The Tennessee annexation statutes, as written and applied, also violate the equal protection clause of the constitution. T.C.A. 6-310 requires persons contesting the annexation of an area to show that the annexation is unreasonable unless the area being annexed is the site of substantial industrial plant development. If the territory to be annexed be the site of substantial industrial plant development, then the burden of proof is upon the municipality to show that such annexation is reasonable.

Thus the law has developed a double standard, one standard for individuals living within an industrial area and another standard for persons living in areas not industrial.

5. Petitioners contend that their constitutional rights as to due process are violated when a five member governing body of a municipality, elected by voters residing within that municipality, can reach out beyond the territorial limits of that municipality and impose burdens and restrictions upon their persons and property. Fundamental fairness as embodied under the due process clause, compels a finding that an annexation without representation or without the persons residing within a territory to be annexed being permitted to vote on the question in a democratic election, is a giant stride toward dictatorial form

of government. It leaves the question of annexation up to the personal opinions and philosophies of the governing board of the municipality.

CONCLUSION

There is another petition for Writ of Certiorari being filed simultaneously in this Court relating to another area of the same annexation program of the City of Chattanooga (Hartley et al v. The City of Chattanooga, et al) and to the extent applicable, said petition is referred to and adopted herein. For the foregoing reasons, petitioners pray that a Writ of Certiorari be issued to review the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX A

[fol. 1]

IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE, EX REL., LUCIUS P. HUDSON, ET AL., *Appellants*,

VS.

CITY OF CHATTANOOGA, ET AL., *Appellees*.

HAMILTON EQUITY
HON. ROLAND PRICE,
CHANCELLOR

FOR APPELLANTS:

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CHATTANOOGA, TENNESSEE.

SHATTUCK & PAYNE,
CHATTANOOGA, TENNESSEE.

FOR APPELLEES:

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RANDALL L. NELSON
CHATTANOOGA,
TENNESSEE.

OPINION

(Filed July 29, 1974)

This appeal is from an adverse decree of the Chancellor upholding the validity of three ordinances enacted for the purpose of annexing certain areas of Hamilton County to the City of Chattanooga.

The suit was filed by Lucius P. Hudson and other residents and citizens of the affected areas under the authority of T.C.A. Section 6-310 seeking to have the annexation proceedings declared unreasonable and unnecessary for the welfare of the residents and property owners of the

affected areas as well as the residents and property owners of the City of Chattanooga.

[fol. 2] Relators, appellants, demanded a jury to try the cause.

Appellants filed an answer in which they denied the annexation of the areas is not reasonable or necessary for the welfare of the residents and property owners of the affected areas and the residents and citizens of the City.

Appellees filed depositions, affidavits and exhibits in support of their answer.

Appellants filed a motion for summary judgment that questioned the proposed plans of services which was denied. The Chancellor likewise denied appellants' demand for a jury.

Appellants offered the testimony of a number of witnesses in their behalf, after which appellees moved the Chancellor to sustain the annexation ordinances. The Chancellor granted the motion and dismissed appellants' suit.

Appellants perfected this appeal and have assigned four alleged errors on the part of the Chancellor.

Appellants first insist the Chancellor erred in overruling appellants' motion for summary judgment based on the City's proposed plans of services.

In support of this assignment, appellants insist that, although the City did submit plans of services under the Annexation Act of 1971 using the variable tax structure, the Act authorizing a variable tax was held unconstitutional and, therefore, the plan is void. We disagree.

[fol. 3] T.C.A. Section 6-309 sets forth two requirements to be met by the City in annexing adjacent areas. It must adopt a plan setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the area.

Secondly, the plan must be submitted to the local planning commission for study and written comment.

The record shows there were three resolutions adopted by the City Commission, which set forth and identify the specific services to be rendered to the areas and project the time of furnishing the services to each area. The resolutions were adopted on January 25, 1972.

The record further shows, and appellants admit, that the plans of services were submitted to the planning commission. The record, also, shows the planning commission studied the plans and approved them as being adequate on December 13, 1971. The record shows the annexation ordinances were passed on final reading on February 2, 1972.

Thus, the record is clear the City complied with the requirements of T.C.A. Section 6.309.

However, appellants insist the resolutions submitting the plans of services are void because they provide in the event the Variable Tax Act is held to be unconstitutional, the City shall request its engineering consultant to prepare the plan of services under the Act of 1961 which has not been done.

[fol. 4] To the contrary, the record shows each resolution adopted by the commission on January 25, 1972, states:

"That if Chapter 420, Public Act of 1971 should be declared invalid, or otherwise not applicable so that separate ad valorem taxes may not be levied and collected for services actually rendered said territory, then all services will be rendered to the territory as soon as practical, immediately in some instances, but not later than the plan of services set out hereinabove."

Thus, the resolutions adopted the plan of services and maintain and project timing of the services to be extended whether the Act of 1971 was declared unconstitutional or not.

Furthermore, the Act of 1971 did not directly deal with plans of services. The constitutionality of the Act is immaterial to the issue of whether there was a compliance with T.C.A. Section 6-309 insofar as the plans of services were legally adopted.

Finally, the plans of services are based not upon the financial ability to provide same, but rather upon the physical ability to provide them within the projected time.

We think T.C.A. Section 6-309 was complied with and overrule the assignment.

Next, appellants insist T.C.A. Sections 6-309 and 6-310 and appellees' action thereunder violated the Fifth and Fourteenth Amendments and Article IV, Section 4 of the Federal Constitution, and Article 1, Sections 2, 8 and 21, and Article 11, Sections 27 through 29, and Article 11, Section 8 of the Constitution of Tennessee. We overrule the assignment.

[fol. 5] "It is clear - - - that Hunter precludes constitutional challenge under the Fourteenth

Appendix A

Amendment to annexations by municipal corporations of adjoining territory on the basis of the procedure employed or authorized by the State or because of the pecuniary repercussions in the form of the ordinary incidents of city taxation." Deane Hill Country Club, Inc. vs. City of Knoxville, 379 F.2d 321, cert. denied 88 S. Ct. 476, 389 U.S. 975, 19 L. Ed. 2d, 467 (1967).

In the case of State, ex rel., Balsinger vs. Town of Madisonville, 222 Tenn. 272, 435 S.W. (2d) 803 (1968), this Court said:

> "As to the contention the ordinance conflicts with certain provisions of our state and federal constitutions, this Court, in the case of Williams vs. Nashville, 89 Tenn. 487, 15 S.W. 364 (1891), said: 'It is contended that this Act is void because in conflict with the Fifth Amendment of the Constitution of the United States, which provides that: "No person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation;" and also because of in conflict with similar provisions of the Constitution of the State of Tennessee, "that no man shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land." (Article 1, Section 8); and "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Article I, Section 21.
>
> "'As a matter of course, the act would be inoperative, null, and void, if, in fact, it violated any of those provisions. But it cannot be that it does so.

The extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use. If it were held to be so, then no municipal corporation could be established or enlarged, and none of these valuable instrumentalities of the State would have a lawful existence.

[fol. 6] "'Even the statutes of annexation to which complainants ascribe the sanctity of general laws, would be utterly unavailable for the same reason.

"'Placing property within the corporate limits of a given town or city, where it will be subjected to additional burden of municipal taxation and supervision, is not a taking of the property at all.'"

Again, in the case of Stall vs. City of Knoxville, 211 Tenn. 271, 364 S.W. (2d) 898 (1962), this Court said:

"Relators cite as error the action of the trial judge in sustaining demurrers to their attacks on the constitutionality, under both the state and federal constitutions, of the ordinances and statutes under which they were passed. We think the action of the trial court was proper in this regard. The constitutionality of the statute was upheld in Witt vs. McCanless, 200 Tenn. 360, 292 S.W. (2d) 392, and again in Morton vs. Johnson City, 206 Tenn. 411, 333 S.W. (2d) 924, and was considered established in Knoxville vs. State, ex rel., Graves, 207 Tenn. 558, 341 S.W. (2d) 718. These cases established the constitutionality of the statute in question and, therefore, if these ordinances under attack meet the requirements of the statutes, they are valid and constitutional."

However, appellants call our attention to Chapter 753 of the Public Acts of 1974, enacted March 28, 1974, which amends T.C.A. Section 6-310 by providing:

> "The municipality shall have the burden of proof that an annexation ordinance is reasonable for the overall well-being of the communities involved."

However, Counsel evidently overlooked Section 6 of the Act which reads:

> "Nothing contained in this Act shall affect annexation proceedings initiated prior to the effective date of this Act."

[fol. 7] The record is clear these proceedings were initiated prior to the effective date of the amendment which was April 5, 1974.

Appellants further insist the annexation statutes violate due process because they do not require a prior hearing.

To the contrary, T.C.A. Section 6-309, by its first paragraph, requires a prior hearing.

Moreover, any aggrieved property owner may file an action within thirty days to contest the proposed annexation which action suspends the annexation until the final outcome of the suit. Thus, the property owners are given the right to a prior hearing before the annexation can become effective.

Appellants contend T.C.A. Section 6-310 has "developed a double standard," that is, the Section provides "one standard for individuals living within an industrial area and another standard for persons living in areas not industrial." They insist this provision of the Section runs afoul of the equal protection guarantee as well as to Article 11, Section 8 of the Constitution of this State. We disagree.

Appendix A

Where classifications are reasonable they are constitutional.

"It is well-settled that constitutional provisions against class legislation apply only when statutory classification bears no reasonable or natural relation to the object sought to be accomplished. It is further settled that [fol. 8] classifications made by the legislature are reviewable by the court only where there is a showing that the classification is palpably arbitrary and that if the reasonableness of the classification is fairly debatable it must be upheld." City of Chattanooga vs. Harris, 223 Tenn. 51, 442 S.W. (2d) 602 (1969).

The paragraph of T.C.A. Section 6-310 under attack by the above insistence of creating a double standard reads as follows:

> "Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden of proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants."

It is not unreasonable to require a municipality to show the annexation of an industrial plant is not for the sole purpose of increasing municipal revenue.

Corporations can and do furnish some of their own services such as police and fire protection; whereas, individual residents do not have such means.

Likewise, corporations do not need schools which individual citizens do.

[fol. 9] For the above reasons the classification is reasonable.

As to appellants' insistence they were entitled to a jury trial, this Court has said, in the case of Balsinger vs. Town of Madisonville, supra:

> "The constitutional guaranty of trial by jury refers to common law actions and not to suits of an equitable nature."

Where the question of whether the ordinance is reasonable or unreasonable is a fairly debatable question it is not a question for the jury. Morton vs. Johnson City, 206 Tenn. 411, 333 S.W. (2d) 924 (1960).

The Chancellor found and we agree the question was a fairly debatable one under the evidence.

Appellants' third assignment of error contends: "The court erred in excluding certain evidence concerning the probability that children in the affected area would come under the busing order of the United States District Court as it pertains to the City of Chattanooga.

The record shows that approximately eighty per cent of the students in the areas sought to be annexed were being transported by bus to schools they attend. Thus,

it is not relevant whether they would be bused in the City system or not. We overrule the assignment.

Appellants, by their fourth assignment of error, contend the trial judge erred in granting appellees' motion to sustain the annexation ordinances, and dismiss appellants' suit.

[fol. 10] Although the only evidence introduced at the trial was that of witnesses introduced by appellants, the evidence is conflicting as to the reasonableness or unreasonableness of the proposed annexation.

This being true, we must apply the rule where the question of reasonableness or unreasonableness of the ordinance is a fairly debatable one, then the discretion of the legislative body of the City is conclusive.

It results, all assignments of error are overruled and the judgment of the trial court is affirmed. Appellants will pay the cost.

/s/ Chester C. Chattin
CHESTER C. CHATTIN
JUSTICE

DYER, C. J.,
McCANLESS AND FONES, JJ.,
AND LEECH, S. J., CONCUR.

APPENDIX B

[fol. 1]

IN THE CHANCERY COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, EX REL LUCIUS P. HUDSON, ET AL.,
Plaintiffs

VS.

CITY OF CHATTANOOGA, TENNESSEE, ET AL.,
Defendants

NO. 45118

MEMORANDUM OPINION

This cause was heard by the Court, without the intervention of a jury upon the pleadings, the reports, and affidavits filed by the City, and the witnesses heard in open Court, from all of which the Court, at the conclusion of the Plaintiff's evidence, sustained the City's Motion to sustain the annexation.

The action of the Court was based, in part, upon the following premises:

1. The City's annexing ordinances were found to be in compliance with the requirements of the statutes of Tennessee.

2. The City's plan for services was found to meet the requirements of the statutes.

3. The constitutionality of the annexing statutes were really not in issue in as much as the Supreme Court of

Tennessee has previously spoken, in clear and unequivocal terms, that same are valid.

4. In determining whether annexation shall stand or fall, the Supreme Court of Tennessee in the case of *State, ex rel. Hardison vs. City of Columbia*, 360 SW(2d)39, dealt with a case comparable to the one at bar, ie, the place of employment of the persons living in the proposed annexed areas, sewage, garbage collection, fire protection, traffic devices, etc. That case is controlling herein.

[fol. 2] 5. In the case of *State, ex rel. Robbins vs. City of Jackson*, 403 SW (2d) 304, the Supreme Court of Tennessee, set forth the test that should be applied by a Trial Court to an annexation ordinance, namely, "... that if there is evidence upon which reasonable men could differ as to the reasonableness of the proposed annexation, as is the case here, this Court will not substitute its discretion or judgment for that of the legislative body of the city."

6. Witnesses were called who advanced many reasons why the ordinances should fail. This Court finds that the fact that a person feels their "life would not be retarded," that they are "happy as is", that roads are good, limited fire service is available, etc., is not sufficient in law to deny annexation.

7. The Plaintiffs called expert witnesses to establish the fact that annexation should fail. Suffice it to say, their testimony, standing alone or considered with all the other witnesses, was not of sufficient probative value to overturn annexation.

8. This Court excluded evidence concerning the probability that children in the affected area would come under the busing Order of the Federal District Court. This was

done because this Court could find no law that allowed this as a basis for denying annexation. It should be noted that this Court fully understands and appreciates the problems involved both for the children and parents, regardless of race, in disallowing annexation.

9. So that there can be no mistake on any party's part, this Court is aware of the case of *State, ex rel. Spoone vs. Mayor and Alderman of Morristown*, 431 SW(2d) 827. This Court finds that the facts of that case are dissimilar, and therefore distinguishable from the case at bar.

10. Perhaps the most cogent testimony of the entire trial was made by the Honorable Chester L. Frost, County Judge of Hamilton County. His testimony, standing alone, is sufficient to sustain the city's Motion. This Court has never heard a more relevant, candid and lucid witness.

[fol. 3] Counsel for all parties are to be complimented on their expedious handling of this case. As always it is a pleasure for a Court to preside over a well tried lawsuit.

A Decree will be prepared in accordance with the ruling of this Court. The Plaintiffs are granted an appeal, if they desire, to the next term of the Supreme Court, setting next in Knoxville.

This the 28th day of November, 1973.

/s/ Roland Prince
CHANCELLOR
Setting by Designation of the
Chief Justice

APPENDIX C

[fol. 1]

STATE OF TENNESSEE, ex rel.,
LUCIUS P. HUDSON, et al.,
Plaintiffs

v.

CITY OF CHATTANOOGA,
TENNESSEE, et al.,
Defendants

NO. 45118

IN THE CHANCERY
COURT OF HAMILTON
COUNTY, TENNESSEE

PART ____

FINAL DECREE

This cause came on to be heard from September 13, 1973, through September 18, 1973, before the Honorable Roland Prince, Judge of Law and Equity, sitting specially, having been designated by the Chief Justice of the Supreme Court of Tennessee to hear this case. Said cause came on to be heard upon the original complaint, the answers of defendants, testimony of witnesses in open court, the defendants' motion to sustain the annexation made at the conclusion of the plaintiffs' evidence, and the entire record as a whole, and from all of which the Court is of the opinion, for the reasons stated in its Memorandum Opinion, dated the 28th day of November, 1973, which is hereby ordered incorporated herein and made a part hereof by reference, and which is directed to be made a part of the record in this cause, and particularly in view of the testimony of Judge Chester Frost, that the annexation of the areas known as 6-8A, 6-8B and 6-8C, being the area generally known as Hixson, by the City of Chattanooga, is not unreasonable in consideration of the health, safety and

welfare of the citizens and property owners, both of the City of Chattanooga and of the territories being annexed, and the validity of the ordinances annexing such areas should therefore be sustained.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court:

1. That Ordinances No. 6381, 6383, and 6385, of the City of Chattanooga, Tennessee, annexing the areas referred to as 6-8A, 6-8B, and 6-8C, respectively, [fol. 2] and Resolutions No. 9160, 6161, and 9162, providing for plans of services for said areas, be and are hereby declared valid and the same are hereby in all respects sustained.

2. That, as provided by Tennessee Code Annotated Section 6-310, said ordinances shall become operative thirty-one (31) days after the entry of this Decree.

3. That the costs of this cause are adjudged against the Relators and the sureties on their cost bonds, for the collection of which execution may issue.

To the actions of the Court in sustaining the validity of the ordinances and resolutions annexing the above set forth areas and providing plans of services thereto, and to the adverse effects of this Final Decree, the Relators excepted and now except, and pray an appeal to the next term of the Supreme Court sitting at Knoxville, which appeal is granted upon their perfecting an appeal as required by law.

THIS the 9th day of January, 1974.

/s/ Roland Prince
JUDGE

APPROVED FOR ENTRY:

SCHOOLFIELD & TAYLOR

By: /s/ John B. Taylor
Counsel for Relators

SHATTUCK & PAYNE

By: /s/ Clarence Shattuck
Counsel for Relators

/s/ Randall L. Nelson
Counsel for Defendants City
of Chattanooga, et al.

APPENDIX D

CHAPTER 420
SENATE BILL NO. 922
By Oehmig

Substituted for: House Bill No. 998

By DeFriese, Holcomb, Davis, Darter, Copeland, Engstrom, Edgar

AN ACT to amend Tennessee Code Annotated, Section 6-309, to provide for procedures for orderly and equitable annexation of territory by municipalities and the imposition of ad valorem taxes incident thereto, and to repeal certain portions of Tennessee Code Annotated, Section 6-309.

WHEREAS, it is the belief of many citizens and the policy of the state of Tennessee here declared that the tax for services that are not available and cannot be rendered or made available within a reasonable period of time after the imposition of such tax is neither equitable, right nor fair and tends to deprive the residents and/or property owners so taxed of equal protection and treatment under the law; and

WHEREAS, the framers of the 1953 Amendments to the Constitution of Tennessee intended to provide new methods for the solution of urban problems then and now facing the hundreds of municipalities of this state (Article 11, Section 9); and

WHEREAS, the natural growth of municipalities creates large fringe suburban areas of municipally disinfranchised citizens whose very existence and livelihood depends upon the soundness and stability of the principal municipality over whose destiny these persons have no voice nor the opportunity to contribute toward its fiscal well being; and

WHEREAS, the concept of uniform taxation was and is based on uniform services rendered and available and was conceived to prevent unequal tax treatment, but such concept of uniform taxation was and is not intended to prevent the natural and orderly expansion of municipal limits commensurate with the natural growth and expansion of people and businesses nor was such concept ever intended to prevent different taxation where it is impossible to render and make available the same services to all persons and to all the territory within the legal limits of the City, particularly when under the law—and rightly so—a municipality cannot render services nor install facilities or equipment beyond its corporate limits except in special instances; and

WHEREAS, the courts of this state have upheld time and again the concept of statutes authorizing and enabling municipalities and local governments creating special taxing districts where one area was thereby benefited out of proportion to the city or county as a whole and conversely should be true where an area is annexed and cannot be benefited as the present city is being rendered services; and

WHEREAS, an orderly, fair and just method of expanding municipal boundaries must be adopted by the state in the fulfillment of its duties and responsibilities of providing by general law the exclusive methods by which municipal boundaries may be altered; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 6-309, is amended by repealing the last two (2) sentences of the second paragraph of Section 6-309.

SECTION 2. Tennessee Code Annotated, Section 6-309, is amended by adding at the end thereof the following:

"That anything contained in Chapter 3 of Title 6 to the contrary notwithstanding, a municipality of over one hundred thousand (100,000) population shall have the supplemental right and authority to annex upon its own initiative by ordinance any territory without levying any municipal ad valorem taxes except for actual municipal services rendered, and that the residents of, and persons owning property in, annexed territory shall be entitled to rights and privileges of citizenship, in accordance with the provisions of the annexing municipality's charter, immediately upon annexation as though such annexed territory had always been a part of the

annexing municipality; and it shall be the duty of the governing body to put into effect with respect to an annexed area any charter provisions relating to representation on the governing body. That any municipality that exercises such right to annex is hereby authorized, required and shall levy separate ad valorem taxes for each municipal purposes and/or service within the existing limits of the city and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal service or purpose for which such taxes have been imposed is actually being rendered; provided however, that in the case of sanitary sewers, such sewers shall be furnished within thirty-six (36) months after ad valorem taxes become due. The provisions of this Act shall not apply in those counties which have the Metropolitan form of Government."

SECTION 3. The provisions of this act shall not apply in counties having a population of more than 700,000 according to the U. S. Census of population of 1970 or any subsequent federal census. Neither shall the provisions of this act apply to municipalities in counties having a population of not less than 260,000 nor more than 280,000 according to the U. S. Census of Population of 1970 or any subsequent U. S. Census of Population.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This Act shall take effect upon being a law, the public welfare requiring it.

Appendix D

PASSED: May 20, 1971

John S. Wilder,
SPEAKER OF THE SENATE

James R. McKinney,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

NOV 25 1974

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-490

STATE OF TENNESSEE, ex rel.,
LUCIUS P. HUDSON, et al.,
Petitioners

vs.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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STATE OF TENNESSEE, ex rel.,
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Petitioners

vs.

THE CITY OF CHATTANOOGA,
TENNESSEE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit that no Writ of Certiorari should issue to review the judgment of the Supreme Court of the State of Tennessee, which Court affirmed the judgment and opinion of the trial court, the Chancery Court of Hamilton County, Tennessee.

OPINION BELOW

The opinion of the Supreme Court of Tennessee, filed July 29, 1974, is reported at 512 S.W.2d 555, and is also appended, with the trial court's opinion and final order to the Petition for Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition for Certiorari.

THE WRIT SHOULD BE DENIED BECAUSE THE STATE COURT DECIDED THE ISSUES IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT, OTHER FEDERAL COURTS AND THE LAW OF THE LAND.

The sole question presented for review by the Petition for Certiorari is whether the statutes of the State of Tennessee (Tennessee Code Annotated § 6-309 and § 310) which provide for annexation by a municipality by ordinance and the method to contest such annexation ordinance is violative of the Federal Constitutional right to due process of law and equal protection.

The leading case on constitutional law under the Federal Constitution as it pertains to annexation by municipalities is *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151. That case involved a challenge to a state's annexation statutes which allowed consolidation of a city into a larger municipality over the disapproval of a majority of its residents. Therein, in overruling an attack on the Pennsylvania annexation statute based on the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, this Court held:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, na-

> ture and duration of the powers conferred upon these corporations and *the territory over which they shall be exercised rests in the absolute discretion of the state.* Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, *expand or contract the territorial area,* unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . .*" (Emphasis Supplied)

The constitutionality of the very statutes here under attack has frequently and recently been upheld in both the federal and state courts.

In *Deane Hill Country Club, Inc.* v. *City of Knoxville,* 379 F.2d 321 (6th Cir.), cert. denied 389 U.S. 975, 88 S.Ct. 476, 19 L.Ed.2d 467, a case sustaining the constitutional validity of the statutes here assailed, the Court held, after quoting from *Hunter:*

> "It is clear . . . that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territory on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of

city taxation. It follows that the District Court properly dismissed the complaint herein."

Similarly, the Tennessee Supreme Court has, on many occasions, upheld these statutes from constitutional attack: *State, ex rel. Stall* v. *City of Knoxville,* 211 Tenn. 271, 364 S.W.2d 898, cert. denied 372 U.S. 914, 83 S.Ct. 728, 9 L.Ed.2d 721; *State, ex rel. Balsinger* v. *Town of Madisonville,* 222 Tenn. 272, 435 S.W.2d 803; *Witt* v. *McCanless,* 200 Tenn. 360, 292 S.W.2d 392; *State, ex rel. Morton* v. *Johnson City,* 206 Tenn. 411, 333 S.W.2d 924; *Knoxville* v. *State, ex rel. Graves,* 207 Tenn. 558, 341 S.W.2d 718.

Petitioners argue, despite *Hunter,* that annexation is a deprivation of property without due process of law. This issue has long been concluded by the Supreme Court of Tennessee which held, even prior to *Hunter,* in *Williams* v. *Nashville,* 89 Tenn. 487, 15 S.W. 364 (1891):

> "The extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use. If it were held to be so, then no municipal corporation could be established or enlarged and none of these valuable instrumentalities of the State would have a lawful existence.
>
> . . . . . .
>
> *Placing property within the corporate limits of a given town or city,* where it will be subjected to the additional burden of municipal taxation and supervision, *is not a taking of the property at all.* The ownership is in no degree changed, and the increased burden is presumed to be equaled by the increased advantages." (emphasis supplied)

This decision has recently been reaffirmed in *State, ex rel. Balsinger* v. *Town of Madisonville, supra.*

Hunter was recently applied as controlling law in several federal cases raising due process and equal protection challenges to annexations. In *Detroit Edison Co.* v. *East China Township School District,* 247 F.Supp. 296 (E.D. Mich. 1965), aff'd 378 F.2d 225 (6th Cir., 1967), cert. denied 389 U.S. 932 (1967), property owners sued for a declaration that annexation of school districts to a district where their property was located was a violation of the federal constitution. Citing *Hunter, supra,* the District Court held:

> "Any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution." 247 F.Supp. at 299.

The District Court also considered the effect on *Hunter* of *Gomillion* v. *Lightfoot,* 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125 (1960), and further held:

> "Gomillion does not diminish the authority of *Hunter* in annexation *procedure* cases." (Emphasis in the original.) 247 F.Supp. at 300.

On Appeal, the United States Court of Appeals for the Sixth Circuit affirmed in an opinion which included the following relevant discussion:

> "Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District Court noted, both Courts of Appeals relied on *Hunter* v. *City of Pittsburgh* in affirming dismissals of their respective cases. In *Hammonds v. City of Corpus Christi,* 343 F.2d 162 (5th Cir.), cert denied, 382 U.S. 837, 86 S.Ct. 85, 15 L.Ed.2d (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among

> others, that *'the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate'*. And in *International Harvester Co.* v. *Kansas City*, 308 F.2d 35 (10th Cir., 1962), cert. denied, 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498 (1963) after quoting from *Hunter*, stated:
>
> > 'Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. * * *' "
>
> 378 F.2d at 229. (Emphasis Supplied)

In *Gomillion*, this Court further said:

> "[I]f one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers."

Petitioners herein, not unsurprisingly in view of the copious case law directly adverse to their position, have failed to cite any line of authority, or for that matter, even a single case which holds that state annexation laws such as Tennessee's violate either the Due Process or Equal Protection provisions of the Constitution. Annexation is a purely political matter within the power of the States to regulate.

Although not raised by the "Question Presented for Review" in the Petition for Certiorari, petitioners in the "Argument" portion of the Petition raise questions of compliance with the state annexation statutory procedures. These are purely matters of state law raising no federal

issue as noted in *Hunter* v. *City of Pittsburgh, supra.* On this very point, the Tenth Circuit recently denied federal jurisdiction to review an annexation in which procedural errors were alleged, saying:

> "We have held that error in the administration of state law is not a matter of federal cognizance under the Fourteenth Amendment due process clause." (Citing, *International Harvester Co.* v. *Kansas City, supra*) *Wallace* v. *City of Altus, Oklahoma,* 465 F.2d 420 (10th Cir., 1972)."

Petitioner then alleges that it is a violation of due process to require those challenging annexation to bear the burden of proof as to its unreasonableness. This, likewise, is a matter for the states to determine. Indeed, it is well-established in the law that statutes or ordinances are presumed valid and those attacking them must bear the burden of showing them to be invalid.[1] Petitioners' argument, logically extrapolated, is that due process requires the party with the most resources to bear the burden of proof, regardless of who is the plaintiff or defendant. It is respectfully submitted that due process requires no such result.

Instead, it has long been the law that it is up to the states to effectuate remedies, and a state is free to "choose the remedy best adapted, in the legislative judgment to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts

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[1] *Goldblatt v. Town of Hempstead, New York,* 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987; *Erie R. Co. v. Williams,* 233 U.S. 685, 58 L.Ed. 1155, 34 S.Ct. 761, affg. 199 N.Y. 525, 92 N.E. 1084; *Ogden* v. *Saunders,* 12 Wheat 213, 6 L.Ed. 606; *Brown* v. *Maryland,* 12 Wheat 419, 6 L.Ed. 678.

satisfies the constitutional requirements of reasonable notice and opportunity to be heard."[2]

Petitioner also raises in "Argument" that Tennessee Code Annotated § 6-310 has an alleged "double standard," one standard for industrial areas being annexed and another for other areas being annexed. The law does set up two different classifications as recognized by the opinion of the Tennessee Supreme Court. That Court then went on to find that the classifications were reasonable and bore a natural relation to the object sought to be accomplished. This is all that is necessary to meet the requirements of Equal Protection.

> "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101.[3]

Here, such a state of facts as to justify the classification was expressly found.[4]

Finally, petitioners in "Argument," assert that Due Process requires that they be given a vote before they can be annexed. This issue has also been decided adversely to petioners' position. In *Adams* v. *City of Colorado Springs*, 308 F.Supp. 1397, aff. 399 U.S. 901, 90 S.Ct. 2197 26 L.Ed.2d 555, reh. den. 400 U.S. 855, 91 S.Ct. 25, 27 L.Ed.2d 93, it was held:

---

[2] *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214.

[3] In *Adams* v. *City of Colorado Springs*, infra, an annexation case, it was held: "The equal protection clause does not preclude creation of distinct classes. It does require that such classifications be reasonably related to some legitimate state interest."

[4] See discussion under headnote 7, 512 S.W.2d 555, 559-60.

> "We must also recognize that there is no absolute constitutional right under the *due process* clause of the Fourteenth Amendment to vote on proposed annexation. *See Sailors* v. *Board of Ed., etc.*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907)."

Hence, under *Hunter* and its progeny, it is clear that the state legislatures have the ultimate control of the methods of annexation by their agency cities and the states' fundamental rights in this area should not be disturbed absent a clear showing of the deprivation of substantial personal right, which showing is not made by the Petition for Certiorari.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the Tennessee Supreme Court was in full accord with the decisions of this Court and the prevailing law and the Petition for Certiorari should be denied.

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